F. M. S. REPORTS.

[ORIGINAL CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

March 5, 1940.

PUBLIC PROSECUTOR vs. PACHAIAPPAN.

[SELANGOR CRIMINAL TRIAL No. 3 of 1940]

Criminal Procedure Code (Cap. 6), section 112—Statement made to police officer in investigation—Incriminating questions—Obligation to speak the truth.

The accused was charged with having made two contradictory statements, the one to a police officer in the course of an investigation, the other in evidence given at a preliminary enquiry. The court accepted the latter as the true statement.

Held, the obligation to speak the truth imposed by section 112 of the Criminal Procedure Code, arises when a question has been asked. Once it appears that a true answer might expose the person questioned to a criminal charge, no answer that such person may give can render him liable to criminal proceedings. It is not essential that the statement should be recorded in the form of question and answer, but it is desirable where possible that this form should be adopted.

A. J. Grattan-Bellew, Deputy Public Prosecutor, for Public Prosecutor.

K. K. Benjamin for accused.

Murray-Aynsley, J.—In this case the accused is charged with an offence under section 193 of the Penal Code. He is charged in the alternative, having made two statements which contradict one another; the Prosecution have not produced extrinsic evidence to show which, if either, of the statements is true. One of the statements is evidence given in a preliminary enquiry in which one Annemalai was charged with murder, the other is a statement made to a Police Officer in the course of an investigation. The accused himself says that the statement in the preliminary Enquiry was the true one. This I accept. Under these circumstances, I would have had no hesitation in convicting the accused in respect of this latter alternative but for the following consideration:

The obligation to speak the truth which is the basis of the charge is imposed by section 112 of the Criminal Procedure Code. The extent of the obligation is to "answer truly all questions relating to such case put to him by such officer other than questions the answers to which could have a tendency to expose him to a criminal charge or to a penalty or forfeiture". This means that the obligation arises when a question has been asked, and once it appears that a true answer might expose the person questioned to a criminal charge, no answer that such person may give can render him liable to criminal proceedings.

In the present case the general tendency of the statement to the Police Officer, as opposed to what the accused said in the Police Court, is exculpatory in character, and if the accused had said to the Police Officer what he afterwards said in the Police Court he would very certainly have exposed himself to a criminal charge. Unfortunately, as usually happens, and as is probably necessary from a practical point of view, the statement is taken down in the form of a running narrative and not in the form of question and answer. There is nothing wrong with this practice, but in the present case it gives rise to difficulties.

We know from the Police Officer that the enquiry was started off by a general question of the type of "what do you know?", and other questions were asked to clarify the narrative but of these we have no record. Now it is clear that if there had been only the general question, a true answer would have exposed the accused to a criminal charge and therefore the obligation to speak the truth never arose. On the other hand, the Prosecution allege that the false answers might have been given in answer to subsidiary questions, which, if answered truly, would not have exposed the accused to a criminal charge, and as the accused seeks to bring himself within an exception he must show what the question was before he can bring himself within the exception.

As the only record is that produced by the Prosecution, and as the statement to the Police Officer was made on August 13th last, and as the accused is a Tamil coolie on an estate, I think that this would throw an impossible burden on the accused. I consider that the failure to taken down the statement in the form of question and answer should not prejudice the accused to the extent of destroying the privilege given under the section.

I should add that though I quite agree it is not essential that the statement should be recorded in the form of question and answer, it is certainly desirable that where possible this form should be adopted.

After I had written the previous part of this judgment, I heard further argument from Mr. Grattan-Bellew, in which he contended that the word "truly" in the section only had reference to the earlier part and did not apply to the exception. That is to say, the effect of this interpretation would be that a person who might incriminate himself might refuse to reply but if he did make an answer it must be true. He

contends that this is the more convenient interpretation. Bearing in mind the fact that this section creates a criminal offence, I would consider that if a person is to be brought within its scope it must be without ambiguity, and if there is ambiguity it must be interpreted in favour of the accused. Actually I do not consider that there is any ambiguity. I think that the section is not patient of the interpretation sought to be put on it by the Prosecution.

I find the accused not guilty accordingly.

Accused acquitted.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. (S.S.), TERRELL, J.A. & CUSSEN, J.

May 23, 1940.

V.V.D.N. SOCKALINGAM CHETTIAR AND TWO OTHERS

(Defendants-Appellants)

vs.

K.R.P.R.S.M. SOMASUNDARAM CHETTIAR

(Plaintiff-Respondent).

[SELANGOR CIVIL APPEAL No. 4 of 1940]

Civil Procedure Code (Cap. 7), sections 78, 80, 127 and 128—1932 Rule No. 1, sub-rules 34, 35, 36 and 40—Ex parte decree—Decree in default of appearance—Estoppel by record—Setting aside decree —Service by posting—Notice of proceedings—Constructive service.

The defendants (appellants) resided in India. On the 8th August, 1939, at the instance of the plaintiff (respondent) the Registrar ordered that leave be granted to issue summonses, together with copies of the plaint and of the order, upon the defendants out of the Federated Malay States. The documents were sent to the Subordinate Judge at Devakottai, and on the 5th November, 1939, the process-server posted the same on the outer doors of the defendants' houses. The summonses required appearance to be entered within 42 days from the date of service. The affidavit of posting by the process-server was returned to the Registry at Kuala Lumpur, but there was no endorsement of due service under section 86 of the Civil Procedure Code.

No appearance was entered and on the 10th January, 1940, the plaintiff applied for judgment in default of appearance. At the hearing of the application counsel appeared for the defendants. He stated that he had that very day been instructed: he was not in a position to contest the application: and he asked for a postponement. Counsel for the plaintiff opposed a postponement and stated that it would be open to the defendants to apply to set aside the decree under sub-rule 40 of 1932 Rule No. 1. The Judge (Gordon-Smith, J.), gave "Order as prayed" and the formal decree contained the words "Upon hearing" counsel for the defendants and recited the fact that a certificate of non-appearance had been read.

Upon the defendants moving to set aside the decree:

Held, (Poyser, C.J.), that the decree is conclusive and is not **ex parte** but **inter partes.** There was in fact an appearance on behalf of the defendants. Neither sections 127 and 128 of the Civil Procedure Code nor sub-rule 40 of the Rules are applicable and it is not competent to set aside the judgment thereunder. No opinion was expressed on the merits of the motion, which was dismissed without prejudice to any application by the defendants to apply for leave to appeal out of time or obtain other relief.

Held (on appeal), that the decree is only part of the record. If the record is examined it is clear that the application is for a judgment in default, that no evidence was called and that the defendants had entered no appearance and presented no argument. The recital of reading a certificate of non-appearance negatives the suggestion that the defendants were properly before the Court. The actual order made was "Order as prayed" and to know what was prayed one must look at the record from which it appears that the summons prays for judgment in default of appearance.

Held further, that there was no order for substituted service; section 78 of the Civil Procedure Code is merely directory; by reason of section 80 "posting" becomes good service only if the Court so declares. In making such declaration the Court will consider whether the defendants have received notice of the proceedings.

Cases referred to:—

(1) *In re a Judgment Debtor* (1937) 1 Ch. 137.

(2) *Porter v. Freudenberg* (1915) 1 K.B. 857.

(3) *Re De Cespedes* (1937) 2 A.E.R. 572; 156 L.T. 471.

(4) *Boyle v. Sacker* 39 Ch. D. 249.

(5) *Redditch Benefit Building Society v. Roberts* (1940) 1 A.E.R. 342.

W. G. W. Hastings and M. N. Cumarasami for defendants.

E. D. Shearn for plaintiff.

Poyser, C.J.—This is a motion to set aside the following decree entered by this Court on the 15th day of January, 1940, viz:

> "Upon hearing **Mr. V. Mackie** of counsel for the plaintiff and **Mr. M. N. Cumarasami** of counsel for the 1st, 2nd and 3rd defendants, and upon reading the summons for judgment dated the 10th day of January, 1940, the certificate of non-appearance dated the 10th day of January, 1940, and the affidavit affirmed by KR. PR. PL. SM. Somasundaram Chettiar on the 9th day of January, 1940, IT IS ORDERED that each of the 1st, 2nd and 3rd defendants do pay to the plaintiff and the 4th defendant the sum of $7,848.55 with interest on such sums from the 12th day of February, 1939, until payment at the Chettiar current account rate prevailing in Kuala Lumpur. AND it is ordered that the one-fifth beneficial interest of the 1st, 2nd and 3rd defendants in the following lands or so many of them as shall be necessary to realise the said three sums of $7,848.55 interest and costs, be sold by public auction under the directions of the Court namely the lands held under Selangor Grants Nos. 2971, 2972, 3184, 3185, 3186, 3241, 3242, 3977, 3981, 3982, 4244, 4557, 4729, 4730, 4731, 4732,